Supreme Court, U.S.
FILED
991191 JAN 18 2000
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

FRANK A. GLOVER,

Petitioner,

v.

TOGO D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

KENNETH M. CARPENTER
Counsel of Record
CARPENTER, CHARTERED
1525 S. Topeka Blvd.
P.O. Box 2099
Topeka, KS 66601-2099
(785) 357-5251

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

54pp

QUESTIONS PRESENTED

Whether this Court's holdings in *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991) and *Brown v. Gardner*, 513 U.S. 115 (1994), the only two United States Supreme Court cases regarding veteran benefits statutes heard after the enactment of the Veteran's Judicial Review Act, create a unique and mandatory rule of statutory construction providing that veteran benefit laws must be construed in the manner that benefits the veteran.

Whether a veteran is entitled to collaterally attack the finality of an Agency Decision based upon the Agency's breach of its statutory duty to assist.

Petitioner respectfully petitions for a Writ of Certiorari to review this case decided below by the United States Court of Appeals for the Federal Circuit.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
STATEMENT OF JURISDICTION 1
PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 6
CONCLUSION 15
APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Albun v. Brown, 9 F.3d 1528 (Fed. Cir. 1992) 11

Bailey v. West, 160 F.3d 1360 (Fed. Cir. 1998) 9

Brown v. Gardner, 513 U.S. 115 (1994) ...4, 5, 6, 7, 8, 10

Hayre v. West, 188 F.3d 1327 (Fed. Cir. 1999) 5, 6, 12, 13, 14, 15

Hodge v. West, 155 F.3d 1356 (Fed. Cir. 1998) 9

Jones v. West, ___ F.3d ___, No. 99-7031 (Fed. Cir. Oct. 25, 1999) (*per curiam*) 6

Karnas v. Derwinski, 1 Vet.App. 308 (1991) 14, 15

King v. St. Vincent's Hospital, 502 U.S. 215 (1991) 4, 5, 6, 7, 8, 10

STATUTES

28 U.S.C. § 1254(1) 1

38 U.S.C. § 1151 10

38 U.S.C. § 2024(d) 8

38 U.S.C. § 5107 1

38 U.S.C. § 5107(a) 3, 5, 6, 13, 15

REGULATIONS

38 C.F.R. § 3.327 2

38 C.F.R. § 3.327(a) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Prof. William A. Fox, *An Analysis of Jurisprudence, Organization, and Operation of the Newest Article One Court*, 2d ed. 182 (1998)..... 11

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review this case decided below by the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Federal Circuit is published as 185 F.3d 1328 (1999) and reprinted in the Appendix ("App.") at App. 1-10. The Opinion of the Court of Veterans Appeals in *Glover v. West* is an unpublished opinion cited as 1998 WL 640959 and reprinted at App. 11-19.

STATEMENT OF JURISDICTION

The Court has jurisdiction to review this Petition with respect to this case pursuant to 28 U.S.C. § 1254(1). The judgment of the Federal Circuit was entered on August 2, 1999 and Rehearing *en banc* was declined on October 19, 1999.

PROVISIONS INVOLVED

38 U.S.C. § 5107. Burden of Proof, benefit of the doubt.

> (a) Except when otherwise provided by the Secretary in accordance with the provisions of this title, a person who submits a claim for

> benefits under a law administered by the Secretary shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Secretary shall assist such a claimant in developing the facts pertinent to the claim. Such assistance shall include requesting information as described in section 5106 of this title.

38 C.F.R. § 3.327 (1979) Reexaminations.

> (a) General. Reexamination will be requested whenever evidence indicates there has been a material increase in disability since the last examination, or where the disability is likely to improve materially in the future.

STATEMENT OF THE CASE

The Petitioner is a Navy veteran who experienced combat during World War II. As a result of his combat experience, the Petitioner suffered from a psychiatric disability and consequently was honorably discharged from the Navy in 1945. Shortly after discharge, the Veteran's Administration's Regional Office ("RO") determined that the Petitioner was entitled to benefits for his service-connected psychiatric disability and awarded him benefits at a 50% disability evaluation.

In 1952, the Petitioner's service-connected disability rating was reduced to 0%. Over twenty-five years later, in 1979, the Petitioner sought an increase in his rating for

his service-connected psychiatric disability. The Petitioner submitted a Veteran Administration medical evaluation report in conjunction with his request for an increased rating. This report did not reference the Petitioner's psychiatric condition and subsequently the RO denied the Petitioner's request for an increase in his disability rating for the psychiatric disability.

In 1992, the Petitioner again sought an increase in his disability rating and at this time was provided a medical examination by the Veteran's Administration in conjunction with his request. Consequently, the RO increased the Petitioner's disability rating for his service-connected psychiatric disability to 50% as of December 1992, the last date in which the Petitioner sought an increase in his disability rating.

The Petitioner appealed the RO's decision regarding the effective date assigned to his increased disability rating, claiming that his disability rating should have been increased in 1979 when he first made the request. Specifically, the Petitioner claimed that pursuant to 38 C.F.R. § 3.327(a) and the Veteran Administration's statutory duty to assist, as codified at 38 U.S.C. § 5107(a), the RO was required to conduct a medical exam in 1979 when he requested an increase in his disability rating. The RO failed to provide such an examination and therefore its 1979 decision denying his request for an increased disability rating constituted "clear and unmistakable error" that is subject to revision.

The Court of Appeals for Veteran Claims ("CAVC") rejected the basis of the Petitioner's appeal, holding that

pursuant to 38 C.F.R. § 3.327(a), the RO must only examine a claimant if the veteran presents evidence of a material change in his service-connected disability. The CAVC found that the Petitioner presented no evidence that his psychiatric condition had changed from 1951 to 1979 when he made his request for an increase in his disability rating and therefore the RO was under no legal obligation to provide a reexamination under 38 C.F.R. § 3.327(a).

On appeal to the Federal Circuit, the Petitioner argued that 38 C.F.R. § 3.327(a) must be construed in the veteran's favor pursuant to this Court's holdings in *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991) and *Brown v. Gardner*, 513 U.S. 115 (1994). As such, the Petitioner claimed that whenever a veteran requests an increase in a service-connected disability, that such a request, in itself, constitutes evidence of a material increase in the disability.

In affirming the CAVC's interpretation of 38 C.F.R. § 3.327(a), the Federal Circuit construed the regulation in the government's favor and against the veteran. In making such a decision, the Federal Circuit determined that the unique rules of statutory construction of veteran benefits laws are not to be employed when the law's language is plain. The Federal Circuit further held that a "bald unsubstantiated claim for an increase in a disability rating is not evidence of a material change in that disability," and therefore insufficient to trigger the RO's duty under 38 C.F.R. § 3.327(a).

The Petitioner petitioned for a Panel Rehearing or Rehearing *en banc*, arguing that pursuant to this Court's holdings in *King, supra*, and *Brown, supra*, that 38 C.F.R.

§ 3.327(a) must be construed in the veteran's favor. The Petitioner further claimed that neither *King* nor *Brown* imposed an initial ambiguity requirement before construing the law in the veteran's favor. But instead, pursuant to the unique canon of statutory construction, the Court must start with the premise that the regulation is intended to benefit the veteran and thus construe the regulation in such a way that benefits the veteran.

The Petitioner further argued that the Federal Circuit's interpretation of 38 C.F.R. § 3.327(a) conflicts with the Veteran Administration's statutory duty to assist. 38 U.S.C. § 5107(a) provides that once a veteran has submitted a well grounded claim, the Veteran Administration has a duty to assist the veteran in developing the facts pertinent to the claim. This duty has been interpreted to require a contemporaneous medical examination. Petitioner argued that he had submitted a well grounded claim for service-connection for his psychiatric disability, which was evidenced by the fact that the RO had determined in 1945 that his psychiatric disability was related to service, that once he made the request for an increase in that service-connected disability rating, the Veteran Administration's statutory duty to assist mandated that he be provided a contemporaneous medical examination. Therefore, the Federal Circuit's requirement that a veteran submit additional evidence of an material increase in the service-connected disability conflicted with the Veteran Administration's statutory duty to assist.

Finally, the Petitioner argued that pursuant to the Federal Circuit's recent holding in *Hayre v. West*, 188 F.3d 1327 (Fed. Cir. 1999), a veteran was entitled to collaterally attack a prior RO decision if the Veteran Administration

breached its statutory duty to assist. *See also Jones v. West*, ___ F.3d ___, No. 99-7031 (Fed. Cir. Oct. 25, 1999) (*per curiam*). The Petitioner argued that since the RO failed to provide a thorough and contemporaneous examination as required by 38 U.S.C. § 5107(a) and 38 C.F.R. § 3.327(a), the RO breached its duty to assist and the 1979 RO decision was therefore non-final as a matter of law. The Federal Circuit Decision in *Hayre* provides for an alternative method to "collaterally attack" the finality of a prior Agency's decision.

The Federal Circuit denied the Petitioner's Petition.

REASONS FOR GRANTING THE WRIT

This case presents the Court with an opportunity to provide definitive guidance on its holdings in *King* and *Gardner* and the Federal Circuit's interpretation of both. It is the Petitioner's assertion that both *King* and *Gardner* hold that veteran benefits laws are to be construed in the veteran's favor. Such a holding is clearly in keeping with the purpose of veteran benefits, which is to award benefits; as well as the pro-claimant nature of the veteran benefits adjudication system.

However, contrary to the mandatory canon of construction contained in both *King* and *Gardner*, the Federal Circuit and CAVC have first imposed an ambiguity requirement into the veteran benefits law before such law is to be construed in the veteran's favor. Such a requirement conflicts with this Court's holding in *King* and *Gardner*, as well as the purpose of veteran benefits statutes and pro-claimant adjudication system.

A veteran has a mandatory right to seek statutory and regulatory interpretations from the Federal Circuit. In fact, statutory and regulatory interpretation is essentially the only review the Federal Circuit may undertake relating to veteran benefits claims. As such, the Federal Circuit's misunderstanding of this Court's holding in *King* and *Gardner* is egregious in light of the Federal Circuit's role in the veterans benefits adjudication process, as well as the fundamental nature of the veterans benefits scheme.

In its Opinion at issue in the present Writ, the Federal Circuit was asked to interpret 38 C.F.R. § 3.327(a). The Federal Circuit refused to interpret the challenged regulation in the light most favorable to the veteran. It is Petitioner's contention that the plain language of this regulation can be construed either for or against a veteran. In the present case, it is conceded that the plain language of the regulation provides that a reexamination is required whenever "evidence indicates there has been a material increase in the disability since the last examination". However, it is Petitioner's contention that the phrase "evidence indicating a material increase in the disability" must be subject to the most favorable interpretation or construction which would benefit a veteran by requiring an examination. Petitioner contends that the mere fact of a veteran's request for an increase constitutes such evidence. As such, when this phrase is interpreted, a reviewing Court is required to construe the language in the light most favorable to the veteran.

It is clear from the Federal Circuit's Opinion that it failed to do so. In its Opinion, the Federal Circuit states "we agree with the Court's (CAVC) **interpretation** of

§ 3.327(a) that the veteran must come forward with at least some evidence that there has in fact been a material change in his or her disability when that veteran seeks a rating increase. A bald, unsubstantiated claim for an increase in disability rating is not evidence of a material change in that disability". *Glover*, 185 F.3d at 1333 (Emphasis added). The Federal Circuit in accordance with the holdings in *King* and *Gardner* should have interpreted "evidence" pursuant to 38 C.F.R. § 3.327(a) broadly and liberally and not narrowly and restrictively, as was clearly the interpretation of both the CAVC and the Federal Circuit.

In *King v. St.Vincent's Hospital, supra,* this Court was asked to interpret 38 U.S.C. § 2024(d), a provision of the Veteran's Reemployment Rights Act that provides reemployment rights to service personnel. The Petitioner's employer argued that the statute must be interpreted to provide reemployment rights after reasonable tours of duty, but not for a period of three years as contemplated by the Petitioner.

In interpreting the statute, this Court first held that the statute was completely silent as to any durational limits to be placed on the protection it provided. *Id.* at 218. In the instant case, the regulation is likewise silent as to the source or quantity of evidence which would trigger the required examination. In *King*, this Court further held that the employer's interpretation of the statute, as based upon language contained in other provisions of the statute would not be granted any interpretive significance in light of the canon "that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." 502 U.S. 220, at f.n. 9. Accordingly,

the Court held that the statute placed no durational limits on the Petitioner's reemployment rights. Similarly, the interpretation of 38 C.F.R. § 3.327(a) should have been construed to favor the veteran's receipt of an examination.

This Court clearly held that veteran benefits statutes are to be construed in the veteran's favor. The Court's holding did not provide for a threshold ambiguity requirement before the provision can be construed in the veteran's favor. Instead, the Court held that the laws are to be construed in the veteran's favor.

This holding is clearly in keeping with the purpose behind the veteran benefits laws which were created to benefit the veteran. The Federal Circuit, itself has recognized that the veteran benefits statutes are "strongly and uniquely pro-claimant. See, *Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998). Further, in enacting the laws regarding veteran benefits entitlement, Congress created a *sui generis* scheme for "awarding benefit entitlements to a special class of citizens, those who risked harm to serve and defend their country. This entire scheme is imbued with special beneficence from a grateful sovereign." *Bailey v. West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998).

This Court's holding in *King* is clearly in keeping with the purpose of the veteran benefits laws. Meaning, that if the purpose of the veteran benefits laws is to **benefit** the veteran, then it naturally follows that such laws should always be construed in the light most favorable to the veteran, without first imposing any ambiguity requirement.

This Court's mandatory canon of construction for veterans' benefits statutes was again recognized in *Brown v. Gardner*, 513 U.S. 115 (1994), a case involving statutory interpretation of a disability benefits provision. The government, in denying benefits to a veteran asserted that 38 U.S.C. § 1151 imposed a fault requirement on the government in order for it to be liable for benefits. The Court first held that the statute's plain language contained absolutely no mention of a fault requirement, and that the government's implicit interpretations of a fault requirement could therefore only be entertained under the guise of ambiguity. The Court, citing *King*, concluded that even then, such an argument would not prevail because such an ambiguity would have to be resolved in the veteran's favor.

Conceivably, it is the Court's language in *Gardner* that may have led to the Federal Circuit's ambiguity requirement before construing the veteran benefit law in the veteran's favor. However, reading *Gardner* and *King* in conjunction reveals that there is no ambiguity requirements in either of the Court's holdings. In *Gardner*, the Court merely held that even if the government could prove the existence of an ambiguity in the statute, the government's interpretation of the statute would not prevail since the statute must be construed in the veteran's favor. In *King*, the Court quite simply held that veteran benefits statutes are to be construed in the veteran's favor. As such, there is no ambiguity requirement imposed upon the Court's mandatory canon of construction that the benefits provisions are to be construed in a veteran's favor.

In the present case, the Federal Circuit was asked to construe a regulation in the veteran's favor. Instead of

employing this Court's mandatory canons of construction, the Federal Circuit interpreted the regulation **against** the veteran and in the government's favor by adopting their definition. As such, the veteran was denied the benefit of this Court's only two cases regarding construction of veteran benefits statutes, as well as the pro-claimant nature of the veteran benefits adjudication system.

The Federal Circuit's misunderstanding of this Court's mandatory canons of construction, as they relate to veteran benefits laws is egregious in light of the benefit it deprives the veteran. Such a failure affects all veterans who have access to the Federal Circuit's review. As stated **supra**, the Federal Circuit has a **limited**, but vital role in judicial review of veteran claims in that it can only review matters of constitutional, statutory and regulatory interpretation. The Federal Circuit's limited jurisdiction over constitutional, statutory and regulatory interpretation is illustrated by the fact that although the CAVC has issued over 10,000 opinions since its inception in 1988, the Federal Circuit has issued full opinions on only a small number of its appeals on the merits. *See*, Prof. William A. Fox, *An Analysis of Jurisprudence, Organization, and Operation of the Newest Article One Court*, 2d ed. 182 (1998). If appeal to the Federal Circuit does not raise a constitutional question, a question as to interpretation of constitutional or statutory provision or a question as to a regulation's validity relied upon by the CAVC, the Court is required to dismiss the appeal for lack of jurisdiction. *See, Albun v. Brown*, 9 F.3d 1528 (Fed. Cir. 1992).

Further, because of this Court's reluctance to entertain writs regarding veteran benefits laws to date, a

veteran's last practical opportunity for judicial review of veteran benefits issues has been in the Federal Circuit. Such a practicality makes it quite clear that the Federal Circuit's role in statutory and regulatory interpretation is essential to ensure the veteran's statutory right to judicial review of CAVC decisions.

The Federal Circuit's consistent failure to interpret veteran benefits laws in the veteran's favor nullifies the mandates of their jurisdictional statute in the context of veteran benefit's laws. Meaning, that the Federal Circuit's refusal to interpret the provision in the veteran's favor unless an ambiguity first exists results in the provision being construed in the government's favor and against the veteran. In essence, allowing the Department of Veteran Affairs to return to the state of "splendid isolation" it enjoyed prior to the enactment of the Veterans Judicial Review Act.

The second reason Petitioner respectfully requests the Court to grant this Writ is to provide guidance on the Federal Circuit's recent holding in *Hayre v. West*, 188 F.3d 1327 (1999) and the extension of a veteran's right to collaterally attack a prior final Agency decision. It is the Petitioner's contention that pursuant to the Federal Circuit's holding in *Hayre*, that when a veteran attacks the finality of a challenged RO decision, the reviewing court is required to determine whether the challenged RO decision is final, in light of the arguments raised by the veteran and the existing law. In the present case, the Petitioner claimed that the 1979 rating decision was not final because the Agency failed to provide an examination, thus breaching the Agency's duty to assist. Accordingly, pursuant to *Hayre*, the Federal Circuit was required

to remand the case back to the CAVC for a such a determination.

In *Hayre*, the Federal Circuit recognized that Congressional mandate requires that the VA operate a unique system of processing and adjudicating claims that is both claimant friendly and non-adversarial. *Hayre*, 188 F.3d at 1329. The Federal Circuit further noted that the cornerstone of this unique system is 38 U.S.C. § 5107(a), which provides that the "Secretary shall assist such a claimant in developing the facts pertinent to this claim". *Id.* One purpose of the statutory duty to assist is to "protect a claimant against adverse decisions based on an incomplete, or inaccurate record and to enable the VA to make a **more precise evaluation of the level of the disability** and any changes in the condition." *Id.* (Emphasis added)

Further, in *Hayre*, the Federal Circuit held that a breach of the duty to assist constituted "grave procedural error". *Hayre*, 188 F.3d at 1334. The Federal Circuit held that in cases of grave procedural error, a RO or BVA decision is not final for purposes of a direct appeal. *Id.* The Federal Circuit reasoned that the breach of the duty to assist places "the interests of the veteran, in this uniquely pro-claimant adjudicatory system, in considerable jeopardy in that it effectively extinguishes the claimant's right to judicial review. *Id.*

Finally, in stressing the importance of the duty to assist, the Federal Circuit recognized that "[i]f a veteran, who is later able to obtain counsel or serendipitously discovers a breach of the duty to assist, has no remedy, then the duty to assist becomes a hollow obligation." *Id.*

at 1333. The Federal Circuit then concluded that CAVC case law established that breaches of the duty to assist requires remand to permit the RO the "opportunity to make a reasonable attempt to fulfill the duty to assist, that is, to gather the relevant evidence and documents, to consider the governing statutes, regulations and case law and to perform a critical examination of the justification for the decision." *Id.* at 1334. The Federal Circuit further concluded that according to CAVC case law, "following the fulfillment of the duty to assist, the case is reviewed to determine whether the additional evidence, together with the evidence that was previously of record, supports the allowance of all benefits sought on appeal." *Id.*

As such, the Federal Circuit remanded the case to the CAVC for a determination of whether the statutory duty to assist had been breached by the VA. The Federal Circuit directed that if the CAVC found that a breach had occurred, then the CAVC would be required to remand the case to permit the VA an opportunity to fulfill its duty to assist. *Id.*

The *Hayre* decision was issued on August 16, 1999, after the Federal Circuit's August 2, 1999 decision in the present case. As such, the Petitioner raised the precise issues in *Hayre* before the Federal Circuit in his petition for rehearing. Pursuant to *Karnas v. Derwinski*, 1 Vet.App. 308, 312 (1991), when the law changes after a claim has been filed but before the judicial process has concluded, the veteran is entitled to the more favorable version of the law.

In the present case, it was the Petitioner's contention that pursuant to *Hayre*, he was entitled to a determination of whether the 1979 rating decision was non-final in light

of the Agency's breach of its statutory duty to assist, pursuant to 38 U.S.C. § 5107(a) in failing to provide him a contemporaneous examination. The Federal Circuit refused to address the issue, thereby depriving the Petitioner of the benefit of a change in the law as well as judicial review.

Therefore, the Petitioner requests this Court to review the Federal Circuit's recent holding in *Hayre*, in order to provide guidance on whether a veteran is entitled to a determination as to the finality of an agency decision based upon an assertion that the agency breached its duty to assist.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted, to address the canons of construction to be utilized in interpreting veterans' benefits statutes and regulations. Further, to determine whether the CAVC's holding in *Karnas* must be followed by the Federal Circuit in light of the favorable change in the law created by the Federal Circuit's Decision in *Hayre*.

Respectfully submitted,

KENNETH M. CARPENTER
CARPENTER, CHARTERED
1525 S. Topeka Boulevard
P. O. Box 2099
Topeka, KS 66601-2099
(785) 357-5251

Attorney for Petitioner,
Frank A. Glover

United States Court of Appeals
for the Federal Circuit

99-7015

FRANK A. GLOVER,

Claimant-Appellant,

v.

TOGO D. WEST, JR., Secretary of Veterans Affairs,

Respondent-Appellee.

DECIDED: August 2, 1999

Before NEWMAN, LOURIE, and KELLY,* *Circuit Judges.*

LOURIE, *Circuit Judge.*

Frank Glover appeals from the decision of the United States Court of Appeals for Veterans Claims affirming the Board of Veterans' Appeals' decision that the Regional Office's (the "RO's") 1979 rating decision denying him compensation for a psychiatric disorder was not the result of clear and unmistakable error. *See Glover v. West*, No. 97-222 (CAVC Aug. 5, 1998) (memorandum decision); *Glover v. West*, No. 97-222 (CAVC Aug. 28, 1998) (judgment). We affirm.

---

* Honorable Paul J. Kelly, United States Court of Appeals for the Tenth Circuit, sitting by designation.

BACKGROUND

Glover served in the United States Navy from July 1940 to February 1945, during which time he had numerous combat experiences that resulted in psychiatric disability. *See Glover*, slip. op at 1. In early 1945, Glover was honorably discharged and awarded a 50% disability evaluation for psychoneurosis; following a series of rating decreases, his rating was ultimately reduced to 0% in 1952. *See id.* at 2. In August 1979, Glover sought an increased disability rating for his psychiatric condition and obtained a physician's medical evaluation from the Louisiana Department of Veterans Affairs (a state agency). *See id.* However, the evaluation only addressed Glover's gastrointestinal problems and degenerative disk disease, with no reference to any psychiatric malady. *See id.* Thus, in its October 18, 1979 decision, the RO denied Glover an increased rating for his psychiatric disorder. *See id.* Glover did not appeal this decision, and the decision became final. *See id.*

On December 9, 1992, Glover again sought an increased rating for his psychiatric condition. *See id.* The Department of Veterans Affairs ("DVA") examined Glover for mental disorders and post-traumatic stress disorder (PTSD), and these results, together with those of Glover's physician, Dr. Richard Cincinelli, were sent to the RO. *See id.* The RO concluded that an increased rating for service-connected anxiety reaction-PTSD had been established. *See id.* On April 23, 1993, Glover was assigned a disability rating of 50%, effective December 9, 1992, the date on which his application was received. *See id.*

Glover then filed a Notice of Disagreement regarding the RO's *April 1979* rating decision, arguing that this decision was the result of clear and unmistakable error.[1] *See In re Glover*, No. 94-20 990, slip op. at 1 (BVA Oct. 30, 1996). Specifically, Glover argued that the RO had breached its duty to assist when it failed to examine him to ascertain the nature and extent of his mental illness, thereby resulting in an incomplete and incorrect record. *See id.* at 2-3, 6-7. The Board held that even if the RO had breached its duty to assist by failing to provide Glover with a psychiatric examination, the incomplete record was not the product of clear and unmistakable error. *See id.* at 9.

Glover appealed to the Court of Appeals for Veterans Claims, which affirmed, holding that there was no clear and unmistakable error in the RO's 1979 decision. *See*

---

[1] 38 U.S.C. § 5109A(a) sets forth the statutory basis for the concept of clear and unmistakable error:

> A decision of the Secretary under this chapter is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.

38 U.S.C. § 5109A(a) (1997); *see also* 38 C.F.R. § 3.105(a) (1998). Although not enacted until 1997, 38 U.S.C. § 5109A applies both prospectively and retroactively. *See* Revision of Veteran's Benefits Decisions for Clear and Unmistakable Error, Pub.L. No. 105-111, § 1(c)(1), 111 Stat. 2271 (1997). Thus, despite the finality generally accorded to ratings decisions of the Department of Veterans Affairs, *see* 38 C.F.R. 3.104(a) (1998), clear and unmistakable error provides a limited statutory mechanism by which veterans have attempted to collaterally attack an otherwise final RO decision. *See Bustos v. West*, No. 98-7069, slip op. at 4 (Fed. Cir. June 16, 1999).

Glover, slip op. at 5. The court first disagreed with Glover's contention that the RO had failed in its duty to assist, reasoning that the VA had no duty to attempt to obtain records of which it had no notice. *See id.* at 3-4. The court observed that when Glover was examined in 1979, he was not seeking treatment for a psychiatric disability, he had not informed the physician at the Louisiana DVA that such a condition had recurred, and he had failed to reference the existence of private medical records which documented his psychiatric disability. *See id.* at 4. The court also noted that there was no evidence that Glover attempted to have his psychiatric problems diagnosed or treated in 1979. *See id.*

The court further disagreed with Glover's contention that the VA should have ordered contemporaneous medical and psychological examinations in 1979. The court interpreted the regulation governing reexaminations, 38 C.F.R. § 3.327,[2] to require the veteran to present evidence

---

[2] Both Glover and the Court of Appeals for Veterans Claims incorrectly cited the 1998 version of 38 C.F.R. § 3.327(a), when in fact the 1979 version of this regulation was in effect at the time of the 1979 rating decision. The 1998 version states that:

> Reexaminations, including periods of hospital observation, will be requested whenever VA determines there is a need to verify either the continued existence or the current severity of a disability. Generally, reexaminations will be required if it is likely that a disability has improved, or if evidence indicates there has been a material change in a disability or that the current rating may be incorrect.

of a material change in his or her service-connected condition in order to trigger the VA's obligation to provide a reexamination. *See Glover*, slip op. at 4. Because Glover failed to present any evidence of a material change in his service-connected condition, the court concluded that the VA had no obligation to provide him with a reexamination. *See id.*

Glover appealed to this court.

DISCUSSION

Our jurisdiction to review a decision of the Court of Appeals for Veterans Claims, set forth in 38 U.S.C. § 7292, is highly circumscribed. *See Helfer v. West*, 174 F.3d 1332, 1335 (Fed. Cir. 1999). Under 38 U.S.C. § 7292(a), a party may seek review of a decision "with respect to the validity of any statute or regulation . . . or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision." 38 U.S.C. § 7292(a) (1998). We review the statutory interpretation of the Court of Appeals for Veterans Claims *de novo*. *See Richard v. West*, 161 F.3d 719, 721 (Fed. Cir. 1998).

---

38 C.F.R. § 3.327(a) (1998). The 1979 version of § 3.327(a), which is similar to its successor, states that:

> Reexamination will be requested whenever evidence indicates there has been a material increase in disability since the last examination, or where the disability is likely to improve materially in the future.

38 C.F.R. § 3.327(a) (1979). As the relevant portions of the two versions are not materially different from each other, and the court's interpretation applies equally to both, we conclude that the court's error is harmless.

Glover advances several arguments in support of his claim that the Court of Appeals for Veterans Claims erred in concluding that there was no clear and unmistakable error in the 1979 ratings decision. Glover contends that the court misinterpreted § 3.327(a) by not construing the regulation in a pro-claimant fashion. Specifically, Glover argues that § 3.327(a) mandates a reexamination in *all* cases in which a veteran attempts to reopen a claim for a service-connected disability, and that the agency has no discretion under this regulation to determine whether a reexamination is necessary. Glover continues that the agency's failure to request a reexamination in turn resulted in a violation of its duty to assist. Glover thus argues that the RO's failure to provide him with a reexamination under § 3.327(a), and the resulting breach of the agency's duty to assist, both constitute clear and unmistakable error as a matter of law.

The Secretary responds that, in view of our narrow jurisdictional mandate, we lack subject matter jurisdiction over this appeal because it only involves the application of § 3.327(a) to the factual record of Glover's 1979 claim. Alternatively, assuming that we do have jurisdiction, the Secretary contends that the court properly held that the 1979 rating decision was not the result of clear and unmistakable error. The Secretary argues that the court correctly interpreted § 3.327(a), in either its 1979 or 1998 version, as not requiring a reexamination, and that Glover's interpretation would render most of the regulation's language meaningless. Accordingly, the Secretary asserts that there was no failure to assist, and even if there had been, that failure of the agency to assist cannot be the basis for a clear and unmistakable error claim.

As an initial matter, we agree with Glover that his arguments regarding the court's interpretation of the reexamination regulation, 38 C.F.R. § 3.327, are within our jurisdiction. These arguments clearly fall within the ambit of § 7292(a), which mandates that we have jurisdiction to review decisions of the court involving the interpretation of a statute or regulation relied upon by the Court of Appeals for Veterans Claims.

Turning to the merits, we agree with the Secretary that the court correctly interpreted the relevant portion of the 1998 version of § 3.327(a), and that this interpretation applies with equal force to the relevant portion of the 1979 version of that regulation. In construing a statute or regulation, we commence by inspecting its language to ascertain its plain meaning. *See Bazalo v. West*, 150 F.3d 1380, 1382 (Fed. Cir. 1998). If we conclude that the terms of the statute or regulation are unambiguous, no further inquiry is usually required. *See Cox v. West*, 149 F.3d 1360, 1363 (Fed. Cir. 1998) ("When we find the terms of a statute unambiguous, judicial inquiry should be complete except in rare and exceptional circumstances." (quoting *Freytag v. Commissioner*, 501 U.S. 868, 873 (1991))). Furthermore, we attempt to give full effect to all words contained within that statute or regulation, thereby rendering superfluous as little of the statutory or regulatory language as possible. *See Tallman v. Brown*, 105 F.3d 613, 616 (Fed. Cir. 1997); *Union Pac. Corp. v. United States*, 5 F.3d 523, 526 (Fed. Cir. 1993).

The plain language at issue in the 1979 version of § 3.327(a) (and the 1998 version as well) can only be construed to mean that the DVA is not required to request that the veteran be reexamined in *all* cases, but rather

only when there is evidence suggesting a material change in the veteran's disability. The 1979 version states that:

> Reexamination will be requested whenever *evidence* indicates there has been a *material increase* in disability since the last examination, or where the disability is likely to *improve materially* in the future.

38 C.F.R. § 3.327(a) (1979) (emphasis added). The 1998 version of § 3.327(a) likewise states that:

> Reexaminations, including periods of hospital observation, will be requested whenever VA determines there is a need to verify either the continued existence or the current severity of a disability. Generally, reexaminations will be required if it is likely that a disability has improved, or if *evidence* indicates there has been a *material change* in a disability or that the current rating may be incorrect.

38 C.F.R. § 3.327(a) (1998) (emphasis added). While Glover is no doubt correct in asserting that veterans' benefits statutes should be construed in a liberal, pro-claimant fashion, *see Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998), this fact does not enable us to ignore the plain language of the regulation, which indicates that a reexamination is necessary only if one of the conditions set forth in the regulation is satisfied. *See Smith v. Brown*, 35 F.3d 1516, 1526 (Fed. Cir. 1994) ("[Claimant] cannot rely upon the generous spirit that suffuses the law generally to override the clear meaning of a particular [regulatory] provision."). The 1979 version of the regulation specifically indicates that a reexamination is necessary only when there is evidence of either a material increase

in the veteran's disability since his or her prior examination or when it is probable that the disability will likely improve materially in the future. *See* 38 C.F.R. § 3.327(a) (1979). Glover's interpretation of the regulation renders these conditions meaningless, a result contrary to the canons of statutory interpretation.[3] *See Tallman*, 105 F.3d at 616.

Whether Glover provided adequate evidence that met the requirements of the regulation requires application of the regulation to the facts of the case, an exercise that is beyond our jurisdiction to review. Whether any failure to provide a reexamination would constitute clear and unmistakable error would similarly be fact-based and hence beyond our jurisdiction. However, we agree with the court's interpretation of § 3.327(a) that the *veteran* must come forward with at least some evidence that there has in fact been a material change in his or her disability when that veteran seeks a rating increase. A bald, unsubstantiated claim for an increase in disability rating is not evidence of a material change in that disability and is insufficient to trigger the agency's responsibility to request a reexamination.

---

[3] Glover's argument is even weaker under the 1998 version of the regulation, as that version explicitly states that reexaminations are necessary when the "VA determines" that they are necessary. Moreover, Glover's interpretation would render meaningless the conditions under which a reexamination is mandated under the 1998 version, *viz.*, that a reexamination will generally be necessary when it is probable that the veteran's condition has improved or evidence suggests that there has been either a material change in the veteran's disability or that the veteran's current rating might be incorrect. *See* 38 C.F.R. § 3.327(a) (1998).

Glover also asserts that the agency's failure to provide a reexamination constituted a breach of its duty to assist, and that such breach was clear and unmistakable error. Since the Court of Appeals for Veterans Claims properly interpreted the regulation and held that the regulation was not violated, and since we cannot review that application of regulation to fact, the question whether such a violation would constitute clear and unmistakable error is also beyond our jurisdiction.[4]

CONCLUSION

We conclude that 38 C.F.R. § 3.327 (1979) does not mandate a reexamination in all cases in which a veteran attempts to reopen a claim for service-connected disabilities, but only when the specific requirements of the regulation have been met. Any other issue that has been raised is beyond our jurisdiction. We therefore

AFFIRM.

---

[4] We further note that the recently enacted regulation, 38 C.F.R. § 20.143, specifically provides that breach of the duty to assist does not constitute clear and unmistakable error. *See* 38 C.F.R. § 20.1403(d)(2) (1999).

Designated for electronic publication only

UNITED STATES COURT OF VETERANS APPEALS

No. 97-222

FRANK A. GLOVER, APPELLANT,

v.

TOGO D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before IVERS, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet.App. R. 28(i), this action may not be cited as precedent.

IVERS, *Judge:* The veteran appeals an October 30, 1996, decision of the Board of Veterans' Appeals (BVA or Board) which: (1) concluded that an October 1979 rating decision did not contain clear and unmistakable error (CUE), and (2) denied entitlement to an effective date prior to December 1992 for a 50% disability rating for anxiety reaction with major depression and post-traumatic stress disorder (PTSD). Both parties filed briefs. The Court has jurisdiction of the case pursuant to 38 U.S.C. § 7252(a). For the reasons set forth below, the Court will affirm the decision in part and remand a matter for readjudication consistent with this decision.

I. FACTS

The veteran served in the U.S. Navy from July 1940 to February 1945. Record (R). at 37. He experienced combat on twenty-eight occasions and suffered from a psychiatric disability as a result. R. at 23, 18-19. This condition

lead to the veteran's honorable discharge from the service in early 1945. R. at 37. On February 9, 1945, shortly before discharge, the veteran filed an application for VA compensation and pension benefits for extreme nervousness and combat fatigue. R. 39-43. He was awarded a 50% disability evaluation for a mixed type, symptomatic, psychoneurosis. R. at 44. In September 1945, the veteran's disability rating was reduced to 0%, but restored to 30% shortly thereafter. R. at 57-70. In March 1949, the disability rating was reduced to 10%. An October 1951 VA medical examination resulted in a diagnosis of "gastritis" and an "anxiety reaction." R. at 118. The examining physician found the veteran to be a "friendly, congenial and cheerful individual who [did] not show any tension, anxiety or restlessness during the interview. He [was] mentally alert, free of any delusions, hallucinations or ideas of reference." *Id.* This examination resulted in a reduction in the veteran's disability to 0%, effective January 29, 1952. R. at 120. The veteran did not respond.

In August 1979, the veteran sought an increase in his disability rating. R. at 142. The veteran submitted a medical evaluation report by a physician at the Louisiana Department of Veterans Affairs. R. at 5. The report mentioned only a gastrointestinal disorder and degenerative disc disease. R. at 145. There was no reference to a psychiatric condition. As a result, on October 18, 1979, the regional office (RO) issued a rating decision denying the veteran compensation for an anxiety disorder. R. at 148-50. The letter notifying the veteran of the rating decision was sent to the address provided by the veteran on his August 1979 physician's statement and also on the

veteran's VA claim form. R. at 5. The veteran did not file an appeal and the decision became final. *Id.*

On December 9, 1992, the veteran submitted an application for compensation or pension seeking service connection for what he claimed to be a mental illness resulting from his World War II military service. R. at 6. In his application, he listed his private physician, Dr. Richard Cincinelli, as the primary provider of treatment for his psychiatric disability since 1990. R. at 153. VA examined the veteran for mental disorders and for PTSD. R. at 185-88. This examination resulted in a diagnosis of "major depressive disorder, partial remission, mild." R. at 185. The VA results, coupled with the medical reports of Dr. Cincinelli, were forwarded to the RO, which determined that "increased evaluation [had been] established for service-connected anxiety reaction – post-traumatic stress disorder." R. at 205. On April 23, 1993, the veteran was assigned a disability rating of 50%, effective December 9, 1992, the date when his application for compensation was received at the RO. R. at 208.

The veteran informed the RO of his disagreement with its decision and claimed that the RO had committed clear and unmistakable error in its 1979 rating decision when it failed to examine him for his past mental illness and thereby breached its duty to assist. R. at 6. Before the Board in September 1996, the veteran explained that he had never received notice of the 1979 rating decision which denied him a compensable rating for his condition. *Id.* Finally, the veteran claims that entitlement to an increased rating arose much earlier than December 9, 1992 and, therefore, an earlier effective date should be assigned. R. at 250.

II. ANALYSIS

A. Clear and Unmistakable Error

RO decisions concerning claims for benefits are subject to revision on the grounds of CUE. *See* 38 U.S.C. § 5109A(a); 38 C.F.R. § 3.105(a). A claim of CUE is reasonably raised when the alleged error is stated with some degree of specificity and "persuasive reasons . . . [are] given as to why the result would have been *manifestly* different but for the alleged error." *Damrel v. Brown,* 6 Vet.App. 242, 245 (1994); *Fugo v. Brown,* 6 Vet.App. 40, 44 (1993). In order to find CUE it must be determined (1) that either the facts known at the time were not before the adjudicator or the law then in effect was incorrectly applied, (2) that an error occurred based on the record and the law that existed at the time the decision was made, and (3) that, had the error not been made, the outcome would have been manifestly different. *See Damrel,* 6 Vet.App. at 245; *Russell v. Principi,* 3 Vet.App. 310, 313-14 (1992) (en banc). When reviewing a decision by the BVA as to whether an RO decision was a result of CUE, this Court must determine whether the Board's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and whether the Board stated adequate reasons or bases for its conclusions. 38 U.S.C. § 7104(d)(1); 38 U.S.C. § 7261(a)(3)(A); *see Eddy v. Brown,* 9 Vet.App. 52, 57 (1996); *Glynn v. Brown,* 6 Vet.App. 523, 530-31 (1994); *Lizaso v. Brown,* 5 Vet.App. 380, 385-86 (1993); *Russell* at 315.

In this case, the veteran claims that CUE occurred when the RO failed in its duty to assist him in developing the record. R. at 6. It is true that the VA has a duty to

assist any veteran who submits a well-grounded claim and that this duty is not discretionary. 38 U.S.C. § 5107; 38 C.F.R. 3.159 (1993); *see Caffrey v. Brown*, 6 Vet.App. 377, 383 (1994); *Littke v. Derwinski*, 1 Vet.App. 90, 92 (1990). However, when the veteran was examined by the VA in 1979, he was not seeking treatment for his psychiatric disability nor, apparently, did he inform the physician at the Louisiana Department of Veterans Affairs that such a condition had recurred. If the veteran had referenced the existence of private medical records documenting his psychiatric disability at that time, the VA would have had a duty to assist in acquiring those records. *Caffrey*, 6 Vet.App. at 383. There is no evidence that the veteran made an attempt, in 1979, to have a psychiatric disability diagnosed or treated. As this Court stated in *Porter v. Brown*, 5 Vet.App. 233 (1993), the "VA has no duty to seek to obtain records of which it has no notice." *Id.* at 236-37. Thus, the RO was justified in its rating decision of October 18, 1979, when it determined that, based on the evidence in the record before it, there was no increase in the veteran's service-connected psychiatric disability. R. at 148-50.

The veteran also claims that the failure of the VA to order contemporaneous medical and psychological examinations in 1979 constitutes CUE. Secretary's Brief at 7. However, 38 C.F.R. § 3.327(a) provides: "Reexaminations . . . will be requested whenever VA determines there is a need to verify . . . the current severity of a disability." Such an examination will be required if "evidence indicates there has been a material change in a disability or that the current rating may be incorrect." *Id.* In *Caffrey*, the veteran presented evidence of a material change in

his physical condition to the VA examiner in a successful attempt to obtain a reexamination and to change his disability rating from a previous examination. *Id.* at 381. In this case, the veteran presented no evidence of a material change in his service-connected condition between his examination in 1951 and the one in 1979. Therefore, the VA was under no legal obligation to provide a reexamination. 38 C.F.R. § 3.327(a).

"While it is true that an incomplete record may ultimately lead to an incorrect determination, it cannot be said that an incomplete record is also an incorrect record." *Caffrey,* 6 Vet.App. at 383. As in the present case, if the record is factually correct, it is not erroneous. "Rather, an incomplete record is just that – incomplete. It allows for further development of facts and law to advance the veteran's claim." *Id.* This Court has held that a determination of CUE must be based on the record existing at the time of the prior decision. *Russell,* 3 Vet.App. at 314. The record before the RO in 1979 was correct and the RO based its decision on the evidence contained therein. Therefore, the BVA could not have found that the RO committed CUE in its October 18, 1979 rating decision.

In its decision, the Board provided complete and accurate reasons or bases why the arguments of the appellant did not demonstrate CUE. 38 U.S.C. § 7104(d)(1). *See Eddy,* 9 Vet.App. at 57; *Russell,* 3 Vet.App. at 315. The Court holds that the Board's decision was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 38 U.S.C. § 7261(a)(3)(A).

B. No Notice

The veteran claims that he did not receive notice of the October 1979 rating decision. The letter notifying the veteran of the decision was sent to the address provided by the veteran on his August 1979 physician's statement and also on his VA form. R. at 5. "Principles of administrative regularity dictate a presumption that government officials 'have properly discharged their official duties.' " *Saylock v. Derwinski*, 3 Vet.App. 394, 395 (1992); *Ashley v. Derwinski*, 2 Vet.App. 307, 308-09 (1992) (quoting *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926)). However, the presumption of regularity is not absolute and may be rebutted by the submission of "clear evidence to the contrary." *Rosler v. Derwinski*, 1 Vet.App. 241, 242 (1991). When the appellant submits clear evidence to the effect that VA's "regular" mailing practices are not followed or are not regular, the Secretary is no longer entitled to the benefit of the presumption. The burden then shifts to the Secretary to show that the document was mailed to the appellant. *Id; see United States v. Roses, Inc.*, 706 F.2d 1563, 1567 (Fed. Cir. 1983) ("The presumption [of official regularity may also] operate[ ] in reverse. If [mailing] appears irregular, it is irregular, and the burden shifts to the proponent to show the contrary."). The MANUAL M21-1 Part V, § 23.08(a) provides that all letters that are generated to the claimant from data on the claims development screens are printed two or three times. A copy goes to the claimant, the RO, and, if designated, the service organization.

In this case, the veteran's only argument is that he did not receive the RO's October 1979 decision. Unfortunately, "[e]vidence of nonreceipt by either the veteran or the veteran's representative, standing alone, is not the type of clear evidence to the contrary which would be sufficient to rebut the presumption of regularity." *Ashley*, 2 Vet.App. at 309. Therefore, the veteran has not presented clear evidence to indicate that he did not receive the October 1979 RO decision.

C. Earlier Effective Date

The veteran contends that sufficient lay and medical evidence exists to demonstrate that entitlement for compensation arose earlier than the assigned December 9, 1992, effective date. The assignment of an effective date is governed by both statute and regulation. 38 U.S.C. § 5110(b)(2) reads, "The effective date of an award of increased compensation shall be the earliest date as of which it is ascertainable that an increase in disability had occurred, if application is received within one year from such date." Similarly, 38 C.F.R. § 3.400(o)(2) states that the effective date of an award is the "earliest date as of which it is factually ascertainable that an increase in disability had occurred if claim is received within 1 year from such date [,] otherwise, date of receipt of claim."

In this case, the Board admits that the veteran submitted competent medical and lay evidence to establish that his symptoms existed prior to the assigned effective date. The results of an examination by Dr. Louis Levy II, in 1977, and Dr. Richard R. Cincinelli, in 1992, indicate

severe depression, shaking hands, insomnia, hypertension, and chronic long-term PTSD. R. at 172-74, 260-62. The Board did not provide reasons and bases to explain why this available evidence is not sufficient to establish an effective date earlier than December 9, 1992.

III. CONCLUSION

Accordingly, upon consideration of the record, the veteran's brief, and the Secretary's motion for summary affirmance, the Court holds (1) that the October 18, 1979, rating decision is not the product of CUE, (2) that the claim that the veteran did not receive notice of the October 1979 rating decision is not supported by the record, and (3) that the Board did not provide reasons and bases to explain why an increase in the veteran's condition could not be ascertained prior to the assigned effective date. For these reasons, the Secretary's motion for summary affirmance is denied, the decision of the BVA is AFFIRMED in part, and VACATED and REMANDED in part for readjudication consistent with this decision.

DATED: AUG 5 1998

Copies to:

Kenneth M. Carpenter
Carpenter, Chartered
1525 S.W. Topeka Boulevard
P.O. Box 2099
Topeka, KS 66601

General Counsel (027)
Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, DC 20420

United States Court of Appeals
for the Federal Circuit

ORDER

A combined petition for rehearing and suggestion for rehearing en banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing en banc having been referred to the circuit judges who are in regular active service.

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing en banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on October 26, 1999.

FOR THE COURT
/s/ Jan Horbaly/gk
Jan Horbaly
Clerk

Dated: October 19, 1999

cc: KENNETH M. CARPENTER
FRANKLIN E. WHITE, JR.

(FILED
U.S. COURT
OF APPEALS
FOR THE
FEDERAL
CIRCUIT

OCT 19 1999

JAN HORBALY
CLERK

GLOVER V DVA, 99-7015
(CVA – 97-222)

****

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

****

99-7015

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

FRANK A. GLOVER
Claimant-Appellant,

v.

TOGO G. WEST, JR.,
Secretary of Veteran Affairs,
Respondent-Appellee.

APPEAL FROM MEMORANDUM DECISION OF THE
UNITED STATES COURT OF VETERANS APPEALS IN
97-222 ENTERED AUGUST 5, 1998
JUDGE DONALD L. IVERS

APPELLANT'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC

KENNETH M. CARPENTER
CARPENTER, CHARTERED
1525 S.W. Topeka Blvd.
P.O. Box 2099
Topeka, KS 66601-2099
(785) 357-5251
Attorney for Appellant,
Frank A. Glover

September 14, 1999

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 28(a)(1) and 47.4, counsel for Claimant-Appellant Frank A. Glover certifies the following:

1. The full name of every party or amicus represented by me is:

   Frank A. Glover

2. The name of the real party in interest represented by me is:

   Frank A. Glover

3. The parent companies, subsidiaries and affiliates that have issued shares to the public, of the party or amicus curiae represented by me are:

   None.

4. The name of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court of agency or are expected to appear in this Court are:

   Kenneth M. Carpenter
   P.O. Box 2099
   Topeka, KS 66601
   (785) 357-5251

TABLE OF CONTENTS

PAGE

CERTIFICATE OF INTEREST i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES ..... iii-iv

STATEMENT OF COUNSEL v

POINT OF LAW TO BE CONSIDERED 2

ARGUMENT 2

TABLE OF AUTHORITIES

PAGE

CASE AUTHORITY

Arms v. West, 12 Vet.App. 188 (1999) 8

Bailey v. West, 160 F.3d 1360 (Fed. Cir. 1998) 5

Brown v. Gardner, 513 U.S. 115 (1994) 5-7

Glover v. Brown, U.S. Vet.App. No. 97-222 (August 28, 1998) 1

Green v. Derwinski, 1 Vet.App. 121 (1991) 9

Hayre v. West, 1999 WL 618583, Slip Op. p. 4 (Fed. Cir. 1999) 10

Hodge v. West, 155 F.3d 1356 (Fed. Cir. 1998) 4

Jackson v. West, 12 Vet.App. 422 (1999) 9

King v. St. Vincent's Hospital, 502 U.S. 215 (1991) 3, 5-7

Linnenberger v. Brown, 5 Vet.App. 367 (1993) 10

Littke v. Derwinski, 1 Vet.App. 90 (1990) 9

Proscelle v. Derwinski, 2 Vet.App. 629 (1992) 8

Shipwash v. Brown, 8 Vet.App. 218 (1995) 10

Suttmann v. Brown, 5 Vet.App. 127 (1993) 9

STATUTES

38 U.S.C. § 1151 5

38 U.S.C. § 2024(d) 3

38 U.S.C. § 5107(a) 9-10

REGULATIONS

38 C.F.R. § 3.327 2

38 C.F.R. § 3.327(a) 2-3, 7-8, 10-11

STATEMENT OF COUNSEL

Based on my professional judgment, I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance because the issue decided in *Hayre* is predicated upon similar, if not identical, circumstances to those of this appellant. The disposal of this Appellant's appeal by summary order was made without the benefit of the Panel decision in *Hayre*. The precedents established in *Hayre* are in the judgment of appellant's counsel controlling and dispositive in the instant matter.

/s/ Kenneth M. Carpenter
Kenneth M. Carpenter,
Attorney for Appellant,
Frank A. Glover

99-7015

UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

FRANK A. GLOVER,
Claimant-Appellant,

v.

TOGO G. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee.

APPELLANT'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Pursuant to Rule 35(d) of the Federal Rules of Appellate Procedure and the Federal Circuit Rules, Frank A. Glover respectfully moves for a panel rehearing, or in the alternative, a rehearing en banc of the August 2, 1999 decision of the Court affirming the U.S. Court of Appeals for Veterans Claims ("CAVC") in the case of *Glover v. Brown*, U.S. Vet.App. No. 97-222 (August 28, 1998).

POINTS OF LAW TO BE CONSIDERED

Appellant respectfully submits that in its August 2, 1999 decision, the Panel failed to consider and properly apply the unique rules of statutory construction of veteran benefit laws that equally apply to the interpretation of regulations. Appellant further submits that the Court's interpretation of 38 C.F.R. § 3.327 was legally incorrect in light of the Agency's statutory duty to assist a veteran once he has submitted a well grounded claim.

ARGUMENT

The issue placed before the Panel was whether 38 C.F.R. § 3.327(a) must be construed in a pro-claimant fashion, thereby requiring a reexamination in all cases in which a veteran seeks an increase in a disability rating for a service connected condition. Appellant therefore asserted that the agency's failure to request a reexamination pursuant to 38 C.F.R. § 3.327(a) resulted in a violation of the Agency's duty to assist.

The Panel, in upholding the CAVC's determination that 38 C.F.R. § 3.327(a) does not require a reexamination in all cases – but only where there is evidence suggesting a material change in the veteran's disability, held that the regulation was not to be construed in the veteran's favor when the plain language of the regulation dictated otherwise. As such, the Panel concluded that the plain language of 38 C.F.R. § 3.327(a) merely required the Agency to request a reexamination only when there is evidence suggesting a material change in the veteran's disability.

In reaching such a decision, the Panel failed to correctly apply the unique canons of statutory construction that relate to veteran benefits laws. In addition, the Panel's interpretation of 38 C.F.R. § 3.327(a) is legally incorrect in light of the Agency's duty to assist a veteran once he has submitted a well grounded claim.

King v. St. Vincent's Hospital, 502 U.S. 215, 221 (1991) is the first U.S. Supreme Court to lay out the canons of statutory construction for veteran benefits statutes subsequent to the enactment of the Veterans Judicial Review Act. In *King*, the Court was asked to interpret 38 U.S.C. § 2024(d), a provision of the Veteran's Reemployment

Rights Act that provides reemployment rights to service personnel. The petitioner's employer argued that the statute must be interpreted to provide reemployment rights after reasonable tours of duty, but not for a period of three years as contemplated by the petitioner.

In interpreting the statute, the Court first held that the statute was completely silent as to any durational limits to be placed on the protection it provided. *Id.* at 218. The Court further held that the employer's interpretation of the statute, as based upon language contained in other provisions of the statute would not be granted any interpretive significance in light of the canon "that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favors." 502 U.S. 220, at f.n. 9. Accordingly, the Court held that the statute placed no durational limits on the petitioner's reemployment rights.

The Supreme Court has therefore clearly held that veteran benefits statutes are to be construed in the veteran's favor. The Court's holding did not provide for a threshold ambiguity requirement before the provision can be construed in the veteran's favor. Instead, the Court simply and unequivocally held that the laws are to be construed in the beneficiaries favors.

This holding is clearly in keeping with the purpose behind the veteran benefits laws which were created to benefit the veteran. The Federal Circuit, itself has recognized that the veteran benefits statutes are "strongly and uniquely pro-claimant." *See, Hodge v. West,* 155 F.3d 1356 (Fed. Cir. 1998). Further, in enacting the laws regarding

veterans benefits entitlement, Congress created a *sui generis* scheme for "awarding benefit entitlements to a special class of citizens, those who risked harm to serve and defend their country. This entire scheme is imbued with special beneficence from a grateful sovereign." *Bailey v. West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998).

The Supreme Court's holding in *King* is clearly in keeping with the purpose of the veteran benefits laws. Meaning, that if the purpose of the veteran benefits laws is to **benefit** the veteran, then it naturally follows that such laws should always be construed in the light most favorable to the veteran, without first imposing any such ambiguity requirement.

The Supreme Court's mandatory canon of construction was again recognized in *Brown v. Gardner*, 513 U.S. 115 (1994), a case involving statutory interpretation of a disability benefits provision. The government, in denying benefits to a veteran asserted that 38 U.S.C. § 1151 imposed a fault requirement on the government in order for it to be liable for benefits. The Court first held that the statute's plain language contained absolutely no mention of a fault requirement, and that the government's implicit interpretations of a fault requirement could therefore only be entertained under the guise of ambiguity. The Court, citing *King*, concluded that even then, such an argument would not prevail because such an ambiguity would have to be resolved in the veteran's favor.

However, reading *Gardner* and *King* in conjunction establishes that there is no ambiguity requirement in either of the Court's holdings nor a requirement to first

review the law at issue for its "plain meaning". In *Gardner*, the Court merely held that even if the government could prove the existence of an ambiguity in the statute, the government's interpretation of the statute would not prevail since the statute must be construed in the veteran's favor. As such, there is no plain meaning or ambiguity requirement imposed upon the Supreme Court's mandatory canon of construction that the benefit provisions are to be construed in the veteran's favor.

In the present case, the Panel's decision directly conflicts with the Supreme Court's unique and mandatory canons of construction for veteran benefits laws by expressly stating that the regulation would not be construed in the veteran's favor if the plain language provided otherwise. Both *Gardner* and *King* require an "examination" of the challenged interpretation in terms of whether the challenged interpretation is favorable to the interests of the veteran or is favorable to the government. If the challenged interpretation favors the government, it must be rejected by the reviewing court and a pro-veteran interpretation must be accepted as the only acceptable interpretation of that regulation or statute.

In the present case, the challenged interpretation, as accepted by the Federal Circuit clearly favored the government and disfavored the veteran by requiring the veteran to **first** submit evidence of a material increase in his disability before the agency's duty to assist by providing a reexamination is triggered. It is the appellant's contention that any time a veteran submits a claim for an increased rating in a service connected disability, that the claim itself, as a matter of law, is sufficient to trigger the Agency's duty to provide a reexamination pursuant to 38

C.F.R. § 3.327(a). Such an interpretation favors the veteran and should have therefore been adopted by the Federal Circuit pursuant to the canons of mandatory construction set forth in *King* and *Gardner*. Therefore, the Appellant respectfully requests that the Panel grant the petition for rehearing or, in the alternative that the Court, *en banc*, grant this petition for rehearing in order to interpret 38 C.F.R. § 3.327(a) in the light most favorable to the veteran as required by *King* and *Gardner*.

Second, regardless of the Panel's failure to properly apply the canons of construction relating to veteran benefits laws. The Panel's interpretation of 38 C.F.R. § 3.327(a) is legally incorrect. The Panel held that 38 C.F.R. § 3.327(a) must be construed to only require an examination if the veteran first presents evidence of a material change in the veteran's disability. The Panel further held that a "bald unsubstantiated claim for an increase in disability rating is not evidence of a material change in that disability and is insufficient to trigger the agency's responsibility to request a reexamination." (App. p. 10-11) Such an interpretation is erroneous in light of the precedential case law regarding the agency's duty to assist well-grounded claims.

In the present case, the Appellant was seeking an increase in rating for a service-connected disability. 38 C.F.R. § 3.327(a) specifically deals with claims that seek increased disability ratings for service connected disabilities. It is well established that a claim for an increased rating is well grounded when the veteran indicates that he has suffered an increase in a service-connected disability. *See, Arms v. West*, 12 Vet.App. 188, 200 (1999); *Proscelle v. Derwinski*, 2 Vet.App. 629, 631-32 (1992) (a claim for an

increased rating is generally well grounded when an appellant indicates that he has suffered an increase in disability since the last rating); *Jackson v. West*, 12 Vet.App. 422 (1999) (a well-grounded rating-increase claim requires **only** that the veteran assert that the disability has increased in severity) (*emphasis added*). As such, the law specifically holds that a veteran's "bald unsubstantiated" claim that a disability has increased is clearly sufficient to well ground the claim.

Once a veteran has submitted a well-grounded claim, the Agency's duty to assist is triggered. When faced with a well-grounded rating-increase claim, the Agency is required to assist the veteran. *See, Jackson, supra,* at Syl. par. 9. Pursuant to 38 U.S.C. § 5107(a), once a claimant has submitted a well-grounded claim, the Secretary is required to assist the claimant in developing the facts pertinent to the claim. *See, Littke v. Derwinski*, 1 Vet.App. 90, 91-92 (1990).

Part of the Agency's statutory duty to assist is the provision of a contemporaneous medical examination. When the record does not adequately reveal the current state of the claimant's claim for increased disability, 38 U.S.C. § 5107(a) requires that the Agency provide a thorough and contemporaneous medical examination. *See, Suttmann v. Brown*, 5 Vet.App. 127, 138 (1993), *Green v. Derwinski*, 1 Vet.App. 121, 124 (1991). This Court recently recognized that the Agency's duty to assist included a thorough and contemporaneous medical examination when the record does not reveal the current state of the veteran's disability. *See, Hayre v. West*, 1999 WL 618583, Slip Op. p. 4 (Fed. Cir. 1999), *citing, Shipwash v. Brown*, 8

Vet.App. 218, 222 (1995), *Linnenberger v. Brown*, 5 Vet.App. 367, 369 (1993).

Thus, it is well established that once a veteran submits a well grounded claim for an increase in a service-connected disability, the Agency's duty to assist, pursuant to 38 U.S.C. § 5107(a) requires that the Agency provide a thorough, contemporaneous medical examination in order to ascertain the current state of the veteran's disability. In light of this well established law, 38 C.F.R. § 3.327(a) **must** be interpreted to require an examination once a veteran submits a "bald, unsubstantiated claim" that the disability has increased therefore seeking a rating increase.

In the present case, the Panel failed to interpret 38 C.F.R. § 3.327(a) in keeping with the Agency's statutory duty to assist in well-grounded claims when it determined that a veteran's "bald, unsubstantiated" claim was not sufficient to trigger the Agency's duty to provide an examination pursuant to the regulation. The consequences of the Panel's misinterpretation of § 3.327(a) is to allow the Agency to adjudicate a claim for increase on the basis of no evidence of record of the veteran's current condition. The obvious purpose of a thorough and contemporaneous examination pursuant to the duty to assist is to establish an evidentiary record upon which an appropriate rating for the veteran's service-connected condition can be assigned. The Panel's interpretation of 38 C.F.R. § 3.327(a) is clearly in conflict with established case law and cannot be upheld. As such, the Appellant respectfully requests that the Panel grant the petition for rehearing or that the Court grant the petition for rehearing en banc in order to correctly interpret 38 C.F.R.

§ 3.327(a) in light of the Agency's statutory duty to assist well-grounded claims, which includes a duty to provide a contemporaneous and thorough examination.

Respectfully submitted,

/s/ Kenneth M. Carpenter
Kenneth M. Carpenter, #08012
CARPENTER CHARTERED
1525 S.W. Topeka Blvd.
P.O. Box 2099
Topeka, Kansas 66612
(785) 357-5251

Attorney for Appellant,
Frank A. Glover

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and fifteen copies of the above and foregoing document has been shipped by overnight delivery to the Clerk and two copies to the below named counsel for Appellee on the 14th day of September, 1999, addressed to:

Colleen A. Conry
Trial Attorney
Department of Justice
1100 L Street, N.W., Room 7054
Washington, D.C. 20530

/s/ Kenneth M. Carpenter
Kenneth M. Carpenter

Supreme Court, U.S.
FILED
APR 11 2000
CLERK

(2)

No. 99-1191

In the Supreme Court of the United States

FRANK A. GLOVER, PETITIONER

v.

TOGO D. WEST, JR., SECRETARY
OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
FRANKLIN E. WHITE, JR.
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

1 App

QUESTION PRESENTED

A Veterans Administration regulation provided for the reexamination of any veteran applying for disability benefits "whenever evidence indicates there has been a material increase in disability since the last examination, or where the disability is likely to improve materially in the future." 38 C.F.R. 3.327(a) (1979). The question presented is whether that reexamination requirement was triggered by the filing of an unsupported claim for an increased disability rating.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Brown v. *Gardner*, 513 U.S. 115 (1994)	6, 7
Hayre v. *West*, 188 F.3d 1327 (Fed. Cir. 1999)	7
King v. *St. Vincent's Hosp.*, 502 U.S. 215 (1991)	6, 7
Porter v. *Brown*, 5 Vet. App. 233 (1993)	8

Statutes and regulations:

Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 511, 112 Stat. 3341	1
38 U.S.C. 5107(a)	3
38 U.S.C. 5109A(a) (Supp. III 1997)	3
38 U.S.C. 5110(b)(2)	4
38 U.S.C. 7292	4, 5
38 C.F.R.:	
Section 3.327(a)	5
Section 3.327(a) (1979)	4, 5, 6
Section 3.327(a) (1998)	3, 4, 5
Section 3.400(o)(2)	4
Section 20.1403(d)(2)	7

In the Supreme Court of the United States

No. 99-1191

FRANK A. GLOVER, PETITIONER

v.

TOGO D. WEST, JR., SECRETARY
OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 185 F.3d 1328. The opinion of the United States Court of Appeals for Veterans Claims[1] (Pet. App. 11-19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1999. A petition for rehearing was denied on October 19, 1999 (Pet. App. 20-21). The petition for a

[1] On March 1, 1999, the name of the United States Court of Veterans Appeals was changed to the United States Court of Appeals for Veterans Claims. See Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 511, 112 Stat. 3341.

writ of certiorari was filed on January 18, 2000. The jurisdiction of this Court invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner served in the United States Navy from July 1940 to February 1945. Pet. App. 11. He was honorably discharged and awarded a 50% disability rating for psychoneurosis. *Id.* at 12. In 1951, following a series of rating decreases, the Department of Veterans Affairs (VA) reduced petitioner's disability evaluation to a non-compensable 0% rating, effective January 29, 1952. *Ibid.* That decision was based upon a medical examination that indicated that petitioner was "mentally alert [and] free of any delusions, hallucinations or ideas of reference." *Ibid.*

More than 25 years later, in August 1979, petitioner sought an increase in his disability rating. Pet. App. 12. Petitioner submitted a medical report diagnosing a gastrointestinal disorder and degenerative disc disease, but the report did not refer to any psychiatric condition. *Ibid.* The regional VA office denied petitioner an increased disability rating. *Ibid.* Petitioner did not appeal that decision. *Id.* at 12-13.

Thirteen years later, on December 9, 1992, petitioner again applied for an increased disability rating. Pet. App. 13. In support of his application, petitioner submitted a medical report from a physician who had been treating him for a psychiatric disorder. *Ibid.* That report, combined with mental examinations conducted by the VA, led the VA to grant petitioner a disability rating of 50% for service-connected anxiety reaction, major depression, and post-traumatic stress disorder. *Ibid.* The new rating was made retroactive to De-

cember 9, 1992, the date the agency received petitioner's application. *Ibid.*

Petitioner challenged that decision, arguing that in 1979 the VA had breached its duty under 38 U.S.C. 5107(a) to assist him by not having him examined by a psychiatrist before issuing its decision denying him benefits. Pet. App. 3, 13.[2] The Board of Veterans' Appeals (Board) rejected petitioner's contention, holding that the VA's failure to conduct a psychiatric examination did not constitute a clear and unmistakable error under 38 U.S.C. 5109A(a) (Supp. III 1997). Pet. App. 3.[3]

2. The Court of Appeals for Veterans Claims (CAVC) affirmed in part and vacated and remanded in part. Pet. App. 11-19. The CAVC held (*id.* at 16) that the VA was not obligated in 1979 to reexamine petitioner under 38 C.F.R. 3.327(a) (1998), which provides for a reexamination when "evidence indicates there has been a material change in a disability." The CAVC explained that petitioner "presented no evidence of a material change in his service-connected condition between his examination in 1951 and the one in 1979." Pet. App. 16. The court also found, however, that petitioner had submitted evidence in support of his 1992 application that could warrant an earlier effective date than December 9, 1992, the effective date assigned by the VA, and the CAVC accordingly remanded for the Board "to explain why an increase in [petitioner's]

---

[2] 38 U.S.C. 5107(a) provides that "[t]he Secretary shall assist * * * a claimant in developing the facts pertinent to the claim."

[3] 38 U.S.C. 5109A(a) (Supp. III 1997) provides that "[a] decision by the Secretary * * * is subject to revision on the grounds of clear and unmistakable error."

condition could not be ascertained prior to the assigned effective date." *Id.* at 19.[4]

3. The court of appeals affirmed. Pet. App. 1-10. The court of appeals observed that 38 U.S.C. 7292 "highly circumscribed" its jurisdiction to review the CAVC's decision for either legal or factual error. Pet. App. 5.[5] The court of appeals then held that CAVC properly construed the 1998 version of 38 C.F.R. 3.327(a) and that its interpretation "applies with equal force to the relevant portion of the 1979 version of that regulation." Pet. App. 7.[6]

The court of appeals rejected petitioner's argument that the doctrine that veterans benefits provisions must be construed favorably to the veteran meant that the reexamination regulation required the VA to re-

---

[4] The CAVC explained that 38 U.S.C. 5110(b)(2) and 38 C.F.R. 3.400(o)(2) authorize an increased rating to be made effective up to one year prior to the VA's receipt of the claim. Pet. App. 18.

[5] Section 7292 provides in relevant part:

> (c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision.
>
> * * * * *
>
> (d)(2) Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.

[6] The 1979 version of Section 3.327(a) states that "[r]eexamination will be requested wherever evidence indicates there has been a material increase in disability since the last examination." 38 C.F.R. 3.327(a) (1979).

examine the veteran "in *all* cases in which a veteran attempts to reopen a claim for a service-connected disability." Pet. App. 6. The court of appeals explained that "[t]he plain language [of the regulation] can only be construed to mean that the [VA] is not required to request that the veteran be reexamined in *all* cases, but rather only when there is evidence suggesting a material change in the veteran's disability." *Id.* at 7-8. The court of appeals further held that, in light of the limited review prescribed by 38 U.S.C. 7292, it lacked jurisdiction to consider whether petitioner had provided adequate evidence to trigger the VA's duty to request a reexamination, or whether the VA's failure to order a reexamination, if required, constituted clear and unmistakable error. Pet. App. 9-10.

ARGUMENT

1. Petitioner argues (Pet. 6-12) that the court of appeals' interpretation of 38 C.F.R. 3.327(a) conflicts with the canon of construction that veterans benefits provisions must be construed favorably to veterans. That contention lacks merit, and does not warrant further review by this Court.

The 1979 version of the reexamination regulation provided:

> Reexamination will be requested whenever evidence indicates there has been a material increase in disability since the last examination, or where the disability is likely to improve materially in the future.

38 C.F.R. 3.327(a) (1979). Petitioner contends that the requirement of "evidence indicating a material increase in the disability" to warrant a reexamination may be satisfied by "the mere fact of a veteran's request for an

increase [in his disability rating]." Pet. 7. As the court of appeals explained (Pet. App. 7-8), however, the plain text of the regulation bars that construction. The regulation provides for reexaminations only upon a showing that "there has been a material increase in disability since the last examination," or "the disability is likely to improve materially in the future." 38 C.F.R. 3.327(a) (1979). Those conditions are rendered meaningless under petitioner's construction, which would require a reexamination upon any application for an increase in disability rating. Pet. App. 6. The court of appeals therefore correctly concluded that "[a] bald, unsubstantiated claim for an increase in disability rating is not evidence of a material change in that disability and is insufficient to trigger the agency's responsibility to request a reexamination." *Id.* at 9.[7]

That conclusion does not conflict with *King* v. *St. Vincent's Hospital*, 502 U.S. 215 (1991), and *Brown* v. *Gardner*, 513 U.S. 115 (1994), which recognize that veterans benefits provisions must be construed favorably to veterans. As the court of appeals noted, that canon of construction "does not enable [the court] to ignore the plain language of the regulation, which indicates that a reexamination is necessary only if one of the conditions set forth in the regulation is satisfied." Pet. App. 8. Indeed, *Gardner* itself explained "that interpretive *doubt* is to be resolved in the veteran's favor, see *King* v. *St. Vincent's Hospital*, 502 U.S. 215, 220-

---

[7] The court of appeals also noted that petitioner's "argument is even weaker under the 1998 version of the regulation, as that version explicitly states that reexaminations are necessary when the 'VA determines' that they are necessary." Pet. App. 9 n.3. The fact that this case turns on the construction of a version of a regulation whose text has since been modified is an additional reason why certiorari is not warranted.

221, n.9 (1991)." 513 U.S. at 118 (emphasis added). Neither *King* nor *Gardner* suggests that such a canon of construction authorizes a court to reach a result favorable to a veteran even though the applicable statute or regulation unambiguously bars that result.[8]

2. Petitioner also argues (Pet. 12-15) that this Court should grant review to provide guidance respecting the court of appeals' recent decision in *Hayre* v. *West*, 188 F.3d 1327 (Fed. Cir. 1999). In *Hayre*, the court of appeals held that the CAVC committed legal error in concluding that a single request by the agency's regional office for a veteran's service medical records fulfills the agency's duty to assist the veteran. *Id.* at 1332. The court of appeals further held that, if on remand the CAVC finds a breach of the VA's duty to assist, the decision of the VA or the Board denying benefits is not final and the case must be remanded to the agency to fulfill its duty to assist and to determine whether an award of benefits is warranted. *Id.* at 1335.

Petitioner contends (Pet. 12-13) that under *Hayre* he is entitled to a remand to the CAVC for a determination whether the 1979 decision was final. That contention lacks merit. Unlike *Hayre*, the court of appeals did not find any legal error in the CAVC's decision. Rather, the decision below rejected petitioner's contention that an application for an increase in disability rating alone is sufficient to trigger the agency's responsibility to request a reexamination and upheld the

---

[8] Moreover, petitioner would not necessarily prevail even if he established that a reexamination in 1979 was mandatory and the VA breached its duty to assist him by not providing for one. As the court of appeals noted (Pet. App. 10 n.4), a recently adopted regulation provides that a breach of the duty to assist does not constitute clear and unmistakable error. 38 C.F.R. 20.1403(d)(2) (1999).

agency's determination that "the *veteran* must come forward with at least some evidence that there has in fact been a material change in his or her disability when that veteran seeks a rating increase." Pet. App. 9.

In any event, the CAVC properly found that the agency did not breach its duty to assist petitioner in developing the record. Pet. App. 14-15. When the VA examined petitioner in 1979, petitioner "was not seeking treatment for his psychiatric disability nor, apparently, did he inform the physician at [the VA] that such a condition had recurred." *Id.* at 15. Thus, because petitioner made no attempt in 1979 to have a psychiatric disability diagnosed or treated, the "VA ha[d] no duty to seek to obtain records of which it has no notice." *Ibid.* (quoting *Porter* v. *Brown*, 5 Vet. App. 233, 236-237 (1993)). That fact-bound determination is correct and does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
FRANKLIN E. WHITE, JR.
Attorneys

APRIL 2000